RECENT DECISIONS.

ARNOLD BROCK, *Editor-in-Charge.*
CYRIL J. CURRAN, *Associate Editor.*

BILLS AND NOTES—NEGOTIABILITY—REFERENCE TO EXTRINSIC AGREEMENT.—A promissory note contained the words "value received as *per* contract." *Held,* since the language refers merely to the origin of the consideration and does not indicate that the promise was intended to be modified or restricted by the agreement mentioned, the negotiability of the instrument is unimpaired. *National Bank of Newbury* v. *Wentworth* (Mass. 1914) 105 N. E. 626.

It is elementary that an instrument to be negotiable must be payable unconditionally, 1 Daniels, Negotiable Instruments (6th ed.) § 41, but whether this essential requisite is destroyed by reference to a collateral agreement is often hard to determine. When a note declares itself to be issued or held as security for other obligations, the promise is made solely for the purpose of meeting any default upon them, and therefore is binding only to the extent that such obligations are not satisfied when the note becomes due. *Haskell* v. *Lambert* (Mass. 1860) 16 Gray 592; *American National Bank* v. *Sprague* (1884) 14 R. I. 410. A statement, however, that it is given "on" a certain policy of insurance is only a recital of the consideration for it; *Taylor* v. *Curry* (1871) 109 Mass. 36; see *Union Ins. Co.* v. *Greenleaf* (1874) 64 Me. 123; but if the words are, "subject to the policy," or other contract, the reasonable inference is that payment is to be governed by the stipulations to which the contract refers. *American Exch. Bank* v. *Blanchard* (Mass. 1863) 7 Allen 333; *Klots etc. Co.* v. *Manufacturers etc. Co.* (C. C. A. 1910) 179 Fed. 813; *Rieck* v. *Daigle* (1908) 17 N. Dak. 365. The question is one of interpretation. When the reference to an extrinsic contract is such as to indicate that the promise in the note is limited by the terms of that contract, the negotiable character of the note is destroyed; *Dilley* v. *Van Wie* (1858) 6 Wis. *209; see *Parker* v. *American Exch. Bank* (1894) 27 S. W. 1071; but if the intention so to limit it is not clear it seems the language of the maker will be construed most strongly against him and the negotiability of the note upheld. See *Clanin* v. *Esterly etc. Co.* (1888) 118 Ind. 372; *Bank* v. *Badham* (1910) 86 S. C. 170.

CARRIERS—RIGHT OF OWNER TO CHANGE DESTINATION.—The owner of cotton which had been delivered to defendant railroad at Cooper for shipment to Houston, requested, before the shipment had started, a redelivery to himself at Cooper. The defendant's agent refused the request, and the cotton was shipped on to Houston. The market price at Cooper and Houston being different, the plaintiff suffered damage for which he now sues. *Held,* the plaintiff could recover. *Texas Midland R. R.* v. *Hargrove* (Tex. 1914) 169 S. W. 925.

Although a carrier must in general follow closely the instructions given at the time the goods are accepted for shipment, see *McKahan* v. *American Ex. Co.* (1911) 209 Mass. 270, it is well settled that the owner of the goods, whether shipper or consignee, may, as an incident of his ownership, change his instructions as to the destination, and the carrier is liable if the latter directions are not obeyed. *Scothorn* v. *Staffordshire Ry.* (1853) 8 Exch. *341; *The Martha* (D. C. 1888)

35 Fed. 313; *Cincinnati etc. R. R.* v. *Steele* (1910) 140 Ky. 383. This right, however, is subject to the qualification that it cannot be exercised so as to impose additional burdens on the carrier. It hinges on the ownership of the person seeking to countermand, and since serious consequences to the carrier result from the delivery of goods to the wrong person, *Ratzer* v. *Burlington, etc. Ry.* (1896) 64 Minn. 245, the carrier may demand a surrender of the bill of lading, or in absence thereof, satisfactory evidence of the right of ownership together with sufficient indemnity. See *Ryan* v. *Great Northern Ry.* (1903) 90 Minn. 12. Moreover, if the change is attended with additional cost to the carrier, the owner must pay, *Carr* v. *Pennsylvania R. R.* (1905) 92 N. Y. Supp. 799, and if the carrier is able and willing to transport the goods to the original destination, it is entitled to the full freight, *Violett* v. *Stettinius* (1839) 5 Cranch. C. C. 559, unless, by custom or usage, it is to be paid only for the distance the goods are actually carried. *Sharp* v. *Clark* (1896) 13 Utah 510.

CONSTITUTIONAL LAW—OFFICERS—UNREGULATED DISCRETION.—An ordinance made it unlawful to maintain stock pens containing more than six head of cattle within 300 feet of any hotel or private residence without a permit from the city council. *Held,* the vesting in the city council of an unregulated discretion to issue the permit was constitutional. *Ex parte Broussard* (Tex. 1914) 169 S. W. 660. See Notes, p. 63.

CONSTITUTIONAL LAW—POLICE POWER—PENALTY.—The owner of a tenement house is by statute in New York subject to civil penalty of $50, if any part of his premises is used for the purpose of prostitution. *Held,* the legislature did not intend to hold such owner liable without notice or guilty knowledge. *Tenement House Dept.* v. *McDevitt* (N. Y. App. Div.) Not yet reported. 52 N. Y. L. J. 1015. For a discussion of this case in the lower court reaching the same result, see 14 Columbia Law Rev. 600.

CONTRACTS—ASSIGNABILITY OF EXECUTORY CONTRACTS.—The owner of a hotel leased the premises and furnishings to an experienced hotel man and agreed to accept a percentage of the gross receipts as rental. *Held,* the lease was not assignable to a corporation. *Nassau Hotel Co.* v. *Barnett & Barsh Corporation* (N. Y. 1914) 162 App. Div. 381. See Notes, p. 70.

CRIMINAL LAW—KIDNAPPING BY A PARENT—CONTRACT FOR CUSTODY OF CHILDREN.—A father, by contract, surrendered to his wife all his rights to the custody of their child, but later enticed the child away. *Held,* the father cannot be convicted of kidnapping. *State* v. *Powe* (Miss. 1914) 66 So. 207.

A father's common law right to the custody of his children is based on his natural duty to support and care for them, *State* v. *Baldwin* (1846) 5 N. J. Eq. 454; *Matter of Scarritt* (1882) 76 Mo. 565; see *In re Lewis* (1883) 88 N. C. 31, and since he can not free himself from his obligation, public policy forbids his transferring his legal right of custody to another, whether by gift or contract, except as the statutes provide for adoption or apprenticement. *Hernandez* v. *Thomas* (1905) 50 Fla. 522; *Brooke* v. *Logan* (1887) 112 Ind. 183; *Weir* v. *Marley* (1889) 99 Mo. 484; *Wood* v. *Shaw* (Kan. 1914) 139

Pac. 1165. Contracts awarding custody to third persons, however, have been held valid in a few jurisdictions. *Commonwealth* v. *Gilkeson* (Pa. 1851) 1 Phila. 194; *State* v. *Barrett* (1863) 45 N. H. 15; *Bedford* v. *Hamilton* (1913) 153 Ky. 429. Where custody has been granted to another, the courts frequently refuse to restore the child to the father on habeas corpus, but in such proceedings the courts are really exercising the Chancellor's supervision over infants. 14 Columbia Law Rev. 77. Their prime consideration is the child's welfare, which they often find demands the perpetuation of the bonds of affection established during the custody. *Chapsky* v. *Wood* (1881) 26 Kan. 650; *Cunningham* v. *Barnes* (1893) 37 W. Va. 746; *Legate* v. *Legate* (1894) 87 Tex. 248. If the view is accepted that a parent cannot contract to transfer the custody of his child to a third person, it is difficult to see how a father can divest himself of his legal right to his child's custody, by agreement with his wife. But see *Carpenter* v. *Carpenter* (1907) 149 Mich. 138. While the parental right of custody exists, a father's taking of his own child can hardly be within the scope of a criminal offence, although he might be guilty if he had, by court order, been lawfully divested of that right. *State* v. *Farrar* (1860) 41 N. H. 53; *In re Peck* (1903) 66 Kan. 693.

EJECTMENT—RIGHT TO SECOND TRIAL—WAIVER BY STIPULATION.—In an ejectment suit it was orally stipulated in open court that tax titles to six parcels of the land in litigation were valid, while those of the other six were invalid. Upon this stipulation judgment was rendered, and the defendant took advantage of the judgment in his favor, but moved for a second trial as to the other six parcels. *Held*, the right to a second trial in ejectment was not waived. *Guaranteed Investment Co.* v. *Van Metre* (Wis. 1914) 149 N. W. 30.

Ordinarily stipulations to be binding upon the parties must be in writing. Stipulations, however, orally made in open court are enforcible, *Savage* v. *Blanchard* (1889) 148 Mass. 348; *Slaven* v. *Germain* (N. Y. 1892) 64 Hun 506, except where a statute, like the Wisconsin Statute, provides that such stipulations are not valid unless they are entered in the form of an order by consent. Circ. Ct. Rule 5, 108 N. W. x; N. Y. Gen'l Rules Practice, Rule 11. Assuming that the stipulation in the principal case was binding, although it does not appear that it was entered, the question arises whether it amounted to a waiver of the defendant's right to a second trial in ejectment. At common law a judgment in ejectment was not final, but the claimant was, as a matter of right, entitled to further suits. Warvell, Ejectments § 478. Although in a few states a judgment in such a suit has been made conclusive, N. Y. Code Civ. Proc., § 1525, in most jurisdictions the second trial, at least, is still granted as a matter of right. This right may be waived by either an express waiver, or by facts from which such waiver may be implied. *Ladd* v. *Hildebrant* (1870) 27 Wis. 135; *Roberts* v. *Baumgarten* (1891) 126 N. Y. 336. A mere stipulation of facts would manifestly not authorize any such implication, *Hewitt* v. *Wisconsin etc. Co.* (1892) 81 Wis. 546, nor would the acting upon a judgment by verdict waive the right to a second trial. *Clairview etc. Co.* v. *Hosmer* (1912) 137 N. W. 531. But where, as in the principal case, there has been a judgment upon a stipulation of facts and an action upon this judgment, it would seem that as clear a case of waiver as may possibly be shown has been made out, and the decision in the principal case would appear unsound.

EVIDENCE—CRIMINAL LAW—PRIMA FACIE CASE.—The defendant was indicted for having intoxicating liquors in his possession with intent to sell them. The statute provided that possession of a United States tax stamp should be *prima facie* evidence of guilt of the offense charged. *Held,* evidence of the possession of the tax stamp alone was insufficient to support a conviction. *Dick* v. *Commonwealth* (Ky. 1914) 169 S. W. 496.

A legislature has the power to declare that certain facts shall be *prima facie* evidence of another fact essential to conviction. 2 Chamberlayne, Evidence, § 995; *Commonwealth* v. *Rowe* (Mass. 1895) 14 Gray 47; *State* v. *Hurley* (1867) 54 Me. 562. Such a statute violates no constitutional privilege and the power of the legislature to change rules of procedure in this manner is absolute, 2 Wigmore, Evidence, § 1354, (3), although it has sometimes been urged that the fact upon which the presumption rests must be naturally related to the main fact. *State* v. *Beswick* (1883) 13 R. I. 211; see *People* v. *Cannon* (1893) 139 N. Y. 32; *cf. State* v. *Beach* (1897) 147 Ind. 74, 79. *Prima facie* evidence, in a civil case, is evidence which, if uncontroverted and unexplained, becomes conclusive, and may warrant a directed verdict in accordance. 4 Wigmore, Evidence, §§ 2494, 2495; 1 Chamberlayne, Evidence, § 399. In a criminal case, however, since a verdict can never be directed against the defendant, 4 Wigmore, Evidence, § 2495, 2(b); 1 Chamberlayne, Evidence, §§ 72, 399, the phrase merely signifies evidence sufficient to justify a verdict of guilty if the jury believes beyond a reasonable doubt that the defendant is guilty. *State* v. *Adams* (1912) 22 Ida. 485; *cf. State* v. *Intoxicating Liquors* (1888) 80 Me. 57. The decision in the principal case, although not wholly unsupported, *Sizemore* v. *Commonwealth* (1910) 140 Ky. 338, is based upon a misapprehension that any other construction of the term *"prima facie"* would imply that if the evidence were unrebutted it would become conclusive, an assumption which, of course, is not true, *State* v. *Momberg* (1905) 14 N. D. 291; *State* v. *Adams, supra,* and the decision is, therefore, against the weight of authority. *Shivers* v. *State* (1913) 7 Ala. App. 110; *Walker* v. *State* (Okla. 1912) 127 Pac. 895.

EVIDENCE—NUISANCE—EFFECT UPON OTHERS SIMILARLY SITUATED.—In an action for damages caused by smoke from the defendant's roundhouse, evidence by other residents as to the effect of the smoke in the vicinity of the plaintiff's dwelling was *held* admissible. *Soderburg* v. *Chicago St. P. M. & O. Ry.* (Iowa 1914) 149 N. W. 82.

It is generally held, in an action based upon a nuisance, that the effect of the act complained of may be shown upon other persons or property similarly situated and simultaneously affected, on the theory that it tends to prove the extent and character of the injury and also that the act complained of was the procuring cause of the injury. *Evans* v. *Keystone Gas Co.* (1895) 148 N. Y. 112; *Wylie* v. *Ellwood* (1890) 134 Ill. 281; *Hoadley* v. *Seward & Son Co.* (1899) 71 Conn. 640; *contra, Harley* v. *Merrill Brick Co.* (1891) 83 Ia. 73. Although admitting its force to show the existence of the act alleged as a nuisance, the courts deny its competency on the question of damages. *Fay* v. *Whitman* (1868) 100 Mass. 76. Some jurisdictions, however, regard such evidence as collateral and exclude it on the ground that it leads to a confusion of issues. *Clark* v. *Willet* (1868) 35 Cal. 534, 544; *Concord R. R.* v. *Greeley* (1851) 23 N. H. 237. Such evidence

can never be admitted, however, whatever the nature of the action, unless it appear that all the physical conditions were identical on each occurrence. See *Bradley* v. *Iowa Central Ry.* (1900) 111 Ia. 562. Upon the same theory the result of an experiment may be received in evidence, but the original circumstances must be reproduced in their entirety. *Seibert* v. *McManus* (1901) 104 La. 404; *Decatur etc. Co.* v. *Mehaffey* (1900) 128 Ala. 242; but see *Lake etc. R. R.* v. *Mugg* (1892) 132 Ind. 168. The results of experiments in cases of nuisance are, therefore, considered competent to weaken or strengthen the claim of the plaintiff, at any rate when used to corroborate expert testimony. *Eidt* v. *Cutter* (1879) 127 Mass. 522.

EXTRADITION AND INTERSTATE RENDITION—QUANTUM OF EVIDENCE FOR SURRENDER OF ACCUSED.—The petitioner, in custody for extradition to Canada, sued out a writ of habeas corpus. *Held,* since sufficient evidence was not produced to show reasonable ground to believe him guilty, he should be discharged. *Ex parte LaPage* (D. C. N. D. N. Y. 1914) 216 Fed. 256.

Interstate rendition is controlled by constitutional provision and federal statute. U. S. Const., Art. 4, § 2, (2); U. S. Rev. Stat. § 5278. The sound view imposes a duty upon the executive of the asylum State to surrender fugitives upon the mere demand by the executive of another State, properly supported by the required indictment, information or affidavit. See 10 Columbia Law Rev. 208; *Matter of Voorhees* (1867) 32 N. J. L. 141, 146; *In re Hooper* (1881) 52 Wis. 699; *Ex parte Swearingen* (1879) 13 S. C. 74. The papers filed by the demanding State and the detaining governor's warrant of arrest will be reviewed on habeas corpus proceedings to ascertain their sufficiency. 14 Columbia Law Rev. 665; *People* v. *Brady* (1874) 56 N. Y. 182; see *People* v. *Donohue* (1881) 84 N. Y. 438. Since the federal statute merely requires evidence that the accused is charged with a crime, Moore, Interstate Rendition, § 612, the question of guilt is, in the absence of a state statute, usually left wholly to the courts of the demanding State. *Matter of Clark* (N. Y. 1832) 9 Wend. 212; *In re Greenough* (1858) 31 Vt. 279; *cf.* Moore, Interstate Rendition, § 612; *Kingsbury's Case* (1870) 106 Mass. 223, 225. Although in international extradition enough evidence to convict is not necessary to deport, the treaties between the United States and foreign nations governing these proceedings usually provide for extradiction only when, according to the laws of the place where the person sought is found, his guilt is sufficiently shown to justify his commitment for trial, had the crime been committed in that place, Moore, Extradition, § 337, and this question in the United States is determined by the laws in the particular State in which he is detained. *In re Ezeta* (D. C. 1894) 62 Fed. 972, 981; *In re Farez* (1870) 7 Blatchf. 345, 357. Since the principal case involved only principles of international extradition, the application of this test by the court is clearly sound.

HUSBAND AND WIFE—HUSBAND'S LIABILITY FOR WIFE'S TORTS—ALIENATION OF AFFECTIONS.—A married woman sued another woman and her husband for alienation of the affections of the plaintiff's husband by the defendant wife. *Held,* although the common law liability of the husband for his wife's torts has not been abrogated in Missouri by the Married Woman's Act, the husband is not liable here since his wife's act injures him as greatly as it does the plaintiff. *Claxton* v. *Pool* (Mo. 1914) 167 S. W. 623.

In practically all the States where legislation as to married women

has not expressly changed the common law rule of the husband's liability for the torts of his wife not connected with her separate estate, such legislation has been strictly construed as not abrogating the old rule. See Burdick, Torts (3rd ed.) 141; 12 Columbia Law Rev. 277. This is so in the jurisdiction of the principal case, where the courts have declared that the common law rule remains unchanged, and that additional legislation will be necessary to effect any such change. *Nichols* v. *Nichols* (1898) 147 Mo. 387, 407; *Taylor* v. *Pullen* (1899) 152 Mo. 434. The court admits the force of the general rule, but makes an exception on the facts of this particular case, drawing an analogy from a case in which the husband was exempted from liability for his wife's debts when she had abandoned him and was living in adultery with another man. *Atkyns* v. *Pearce* (1857) 2 C. B. [N. S.] 762. This case, however, was decided on the ground of agency, holding that the wife's authority to charge the husband's credit had been terminated, and does not at all involve the principle advanced here, that the husband is not liable where the wife, in committing the wrong for which he is sought to be held, has at the same time violated her duty to him. This limitation on the husband's liability is unsupported by precedent, and seems unwarrantable in the face of the decisions of the Supreme Court of the State. The case is now before that court on *certiorari,* and it is to be hoped that it will not sustain this exception to the common law rule.

INJUNCTIONS—CONTROL OF EQUITY OVER ELECTIONS—TAXPAYERS' ACTIONS.—A taxpayer sought to enjoin the State Board of Elections from taking steps preliminary to the nomination and election of delegates to a constitutional convention pursuant to a statute which the plaintiff alleges is unconstitutional. *Held,* the injunction will be denied. *Schieffelin* v. *Komfort* (N. Y. 1914) 106 N. E. 675.

The New York Code of Civil Procedure, § 1925, provides that "an action to obtain a judgment preventing the waste of, or injury to, the estate, funds, or other property of a county, town, city or incorporated village of the State, may be maintained against any officer thereof, * * * either by a citizen, resident therein, or by a corporation who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein." The court construes this section to limit the scope of the Taxpayers' Action to suits against municipal and not against state officers. For a discussion of the control of courts of equity over elections, see 13 Columbia Law Rev. 526. As to the inherent power of a court of equity to enjoin proceeding under an unconstitutional statute, in an action which does not involve the individual liberty or property of the plaintiff, see 14 Columbia Law Rev. 243.

INSANITY—CONVEYANCES—AVOIDANCE.—In an action of ejectment by the heirs of a grantor to recover the property, *held,* that evidence of the insanity of the grantor was inadmissible. *Walton* v. *Malcolm* (Ill. 1914) 106 N. E. 211. See Notes, p. 61.

LANDLORD AND TENANT—ENFORCEMENT OF FORFEITURE CONDITIONS IN LEASES.—A landlord expressed his election to declare a forfeiture of a lease for non-payment of rent by bringing an action to recover possession. *Held,* it was too late for the tenant to avoid the forfeiture by a tender of the accrued rent. *Matthews* v. *Crofford* (Tenn. 1914) 167 S. W. 695. See Notes, p. 58.

LIMITATION OF ACTIONS—PRESENTATION OF DEFENSE—DEMURRER.—The plaintiff's petition showed on its face that the cause of action was barred by the Statute of Limitations and failed to set forth the exception which took the case out of the operation of the statute. *Held,* a general demurrer to the petition should have been sustained. *Martin* v. *Gassert* (Okla. 1914) 139 Pac. 1141.

In actions at common law it has been the established rule that a defendant may raise the defense of the Statute of Limitations only by special plea. *Puckel* v. *Moore* (1672) 1 Ventris, 191; *Allen* v. *Word* (1845) 25 Tenn. 284. In suits in equity, on the other hand, when the bar is apparent upon the face of the complaint, it is now generally recognized that this defense may be properly interposed on demurrer. Buswell, Limitations & Adverse Possession, § 383; Story, Equity Pleading (10th ed.) §§ 484, 503 n., 751. And in most of the code States, a demurrer on this ground will be sustained in law as well as in equity, provided the defect is evident. *Hudson* v. *Wheeler* (1871) 34 Tex. 356; 13 Encyc. of Pleading & Practice, 202. Some courts allow a defendant to avail himself of this defense on a general demurrer, but they admit that it is better practice to demur specially. See *Vore* v. *Woodford* (1876) 29 Oh. St. 245; *Coney* v. *Horne* (1894) 93 Ga. 723. In cases where the right of action is not of common law origin, but is granted by a statute which prescribes a period of time within which the right may be enforced, such time limit is not a true Statute of Limitations but rather a condition precedent, and a complaint which shows on its face that this limit expired before the commencement of the action is properly demurrable. *Lambert* v. *Ensign Mfg. Co.* (1896) 42 W. Va. 813; see *The Harrisburg* (1886) 119 U. S. 199, 214. But in all cases actually involving the Statute of Limitations, it is submitted that the New York rule, requiring that the Statute be pleaded specially by way of answer, is the most satisfactory. N. Y. Code Civ. Proc., § 413; see *Green* v. *Hauser* (N. Y. 1890) 18 Civ. Pro. Rep. 354, 360. It seems unjust, at least in actions at law, to permit a defendant to establish this defense on demurrer, since the plaintiff is thereby deprived of his right to reply, and is forced to include in the complaint facts which properly constitute the matter of a replication. See Langdell, Equity Pleading, § 119.

MARRIAGE—ANNULMENT—ALIMONY PENDENTE LITE.—In a suit by a husband to have a marriage annulled, the trial court granted a motion for alimony *pendente lite. Held,* the right to alimony *pendente lite* is solely statutory, and since not authorized by any provision of the statutes cannot be granted. *Taylor* v. *Taylor* (Ore. 1914) 140 Pac. 999.

The ecclesiastical courts of England required a husband to provide for the separate maintenance of his wife during the pendency of a litigation between them because he was bound by the common law to support her. *Bird* v. *Bird* (1753) 1 Lee 209; *id.* 572. This temporary alimony was granted as a necessary incident to the hearing of the cause, *Amos* v. *Amos* (1842) 4 N. J. Eq. 171; *Goldsmith* v. *Goldsmith* (1859) 6 Mich. 285, and so it has usually been held that statutes giving the courts of this country jurisdiction over such suits gave them by necessary implication the right to decree such alimony as indispensible to the proper exercise of their jurisdiction. *McGee* v. *McGee* (1851) 10 Ga. 477; *Petrie* v. *People* (1866) 40 Ill. 334; *Higgins* v. *Sharp* (1900) 164 N. Y. 4. In some few instances, however, the

statutes were construed as enabling the courts to act only as they specifically directed. *Shannon* v. *Shannon* (Mass. 1854) 2 Gray 285; *Wilson* v. *Wilson* (1837) 19 N. C. 377. Having the power to award alimony *pendente lite,* the courts have always exercised it in divorce suits whether the wife was plaintiff or defendant, *Story* v. *Story* (Mich. 1844) Walk. 421, and in annulment proceedings when she was defendant. *North* v. *North* (N. Y. 1845) 1 Barb. Ch. 241. It is, however, denied when she herself seeks to have the marriage declared void, because her allegations are said to negative the duty of support and should be taken as true against herself. *Jones* v. *Brinsmade* (1905) 183 N. Y. 258. This view overlooks the fact that marriage is a status and that the right to temporary support has always been based upon the *de facto* existence of that status, *Bird* v. *Bird, supra; Vroom* v. *Marsh* (1878) 29 N. J. Eq. 15, irrespective of the fact that it may be shown by the final decision not to have been *de jure.* See *Brinkley* v. *Brinkley* (1872) 50 N. Y. 184; *Lea* v. *Lea* (1889) 104 N. C. 603. In the principal case, however, the wife was the defendant, so both upon its general theory and its special facts the decision is opposed to reason and authority.

MASTER AND SERVANT—TORTS—LIABILITY FOR ACTS OF SPECIAL POLICEMAN.—A policeman of the City of Savannah, appointed at the request of the defendant and paid by it, while on duty to preserve order in the defendant's depot, killed the plaintiff's husband. *Held,* in the absence of proof that the policeman was subject to its orders, the defendant corporation is not liable for his torts. *Pounds* v. *Central of Georgia Ry. Co.* (Ga. 1914) 83 S. E. 96.

Where an officer, employed to keep order on the defendant's premises, is directly under the control and orders of the defendant, the ordinary principles of agency apply and the defendant is liable if the act was within the scope of the policeman's authority as the defendant's servant. *Taylor* v. *New York etc. R. R.* (1910) 80 N. J. L. 282; *Illinois Steel Co.* v. *Novak* (1899) 84 Ill. App. 641, affd. 184 Ill. 501; *cf. Sharp* v. *Erie R. R.* (1906) 184 N. Y. 100. But where the officer is under the exclusive orders and control of the public police authorities, the defendant is not liable, and the mere fact that the defendant secured his appointment as a policeman and paid his wages does not make him the defendant's servant. *Healey* v. *Lothrop* (1898) 171 Mass. 263. Even though the officer be the defendant's servant, the latter is not liable for acts done by him as a public officer, and not in furtherance of the defendant's interests, *Tyson* v. *Bauland Co.* (1906) 186 N. Y. 397; *Philadelphia etc. R. R.* v. *Stump* (1910) 112 Md. 571, or for acts done wantonly for the officer's own purposes. *Pennsylvania R. R.* v. *Kelly* (C. C. A. 1910) 177 Fed. 189; *cf. McKain* v. *Baltimore & O. R. R.* (1909) 65 W. Va. 233. It is ordinarily for the jury to decide whether the tort was within the scope of the officer's employment as the defendant's servant, or whether it was committed in his character of police officer. *Hirst* v. *Fitchburg etc. Ry.* (1907) 196 Mass. 353; *Sharp* v. *Erie R. R., supra; Taylor* v. *New York etc. R. R., supra.* The principal case is supported alike by authority and principle in its decision that where the defendant has no control over the officer it is not liable for his torts. *Healey* v. *Lothrop, supra.*

NEGLIGENCE—LIABILITY OF RETIRED PARTNER—INJURY TO INVITEE.—A retired partner, without giving notice of his withdrawal, permitted the

business to continue under the old firm name. The plaintiff, subsequent to the dissolution, was injured through the negligence of a firm servant. *Held,* two judges dissenting, aside from principles of partnership, the retired partner is liable on the ground of implied invitation. *Jewison* v. *Dieudonne* (Minn. 1914) 149 N. W. 20.

A person holding himself out as a partner, when his representations are acted upon, is estopped to deny his liability on firm contracts. Burdick, Partnership (2nd ed.) 67 *et seq.* Accordingly a retiring partner, when he permits continued use of the old firm name, represents that the old business continues, and since it is presumed that credit is extended on the faith of his name, he is held to the liability of a true partner, *Thayer* v. *Goss* (1895) 91 Wis. 90, unless notice of his withdrawal has been given. *In re Fraser* L. R. [1892] 2 Q. B. 633. These principles, however, can be applied only when reliance upon his representation has been the cause of the injury. *Thompson* v. *First National Bank* (1884) 111 U. S. 529. But when it is the tort of a firm servant which has caused the harm, the plaintiff's loss cannot be attributed to the holding out partner, and the latter is relieved from responsibility. Pollock, Digest of Partnership, 59. The decision in the principal case seems to be based upon the theory of invitation. But by this doctrine, the duty of reasonable care is imposed upon an owner or occupant who by his negligent conduct has reasonably induced the user of his premises which resulted in the plaintiff's injury. *Furey* v. *New York Cent. etc. R. R.* (1902) 67 N. J. L. 270. In the principal case, however, the retired partner was not in possession or control of the premises, and could be subjected to the liability of an inviter only on the ground that he was a partner. And since there was neither reliance upon his conduct, nor, as to the accident, any holding out of partnership, the majority opinion would seem unsupportable.

NEGOTIABLE INSTRUMENTS—FRAUD IN INCEPTION—ESTOPPEL.—The plaintiff's signature to a promissory note was obtained by misrepresentation as to the character of the instrument. Though he had ample opportunity to do so, he failed to read it. *Held,* his lack of intention to execute a promissory note was, under the circumstances, no defense against a *bona fide* holder, since where one of two innocent persons must suffer by the fraud of a third, the loss should fall upon him who, by reposing confidence in that third, rendered possible the infliction of the injury. *Munnich* v. *Jaffe* (1914) 149 N. Y. Supp. 338.

The general rule of negotiable instruments that an indorsee for value before maturity and without notice takes free from all equities and defenses between the original parties presupposes the existence of an actual contract in the instrument to be negotiated. *DeCamp* v. *Hamma* (1876) 29 Oh. St. 467; *Walker* v. *Ebert* (1871) 29 Wis. 194. Therefore if it be shown that the promise sued upon was never in fact made, the paper is a legal nullity, and there is no basis for the application of the rule which acts to enforce and not to create obligations. *Foster* v. *MacKinnon* (1869) L. R. 4 C. P. 704. But where the defendant's signature to the instrument was obtained through his own negligence the courts have generally declared that it is better for him to suffer from the fraud which his carelessness renders possible, than that the character of commercial paper should be impaired to the injury of innocent parties. *Douglass* v. *Matting* (1870) 29 Ia. 498; *Chapman* v. *Rose* (1874) 56 N. Y. 137. It is, moreover, now agreed

that failure to read the instrument signed by one having opportunity and ability so to do is sufficient negligence to render him liable as matter of law. 1 Daniel, Negotiable Instruments, § 850; *Ruddell* v. *Dillman* (1881) 73 Ind. 518; see *Van Slyck* v. *Rooks* (Mich. 1914) 147 N. W. 579; *Ort* v. *Fowler* (1884) 31 Kan. 478. It is not necessary, however, to invoke this broad maxim of public policy, since the negligence of the defendants in every instance resulted in the making of a false representation and as an innocent party acted upon it, clearly gave rise to an estoppel. The decisions should be supported upon this truly legal doctrine of estoppel by which the same desired result may be reached. *McCoy* v. *Gouvion's Executrix* (1897) 102 Ky. 386; *Bank* v. *Smith* (1875) 55 N. H. 593. *Foster* v. *MacKinnon, supra.*

OFFICERS—HIGHWAY OFFICERS—LIABILITY FOR NEGLIGENCE.—The defendants, township highway officers, negligently left a ditch across the road exposed over-night without lights, guards or warnings of any kind, whereby the plaintiff, traveling along the highway, was injured. *Held,* although no liability attached to the town of which they were officers, the defendants themselves were personally liable. *Tholkes* v. *Decock* (1914) 125 Minn. 507.

In the absence of statute, counties and unincorporated towns, considered as political subdivisions of the State, are almost universally held not liable for their negligence or that of their officers. 4 Dillon, Municipal Corporations (5th ed.) § 1688. It is difficult to see, however, how this exemption should in any way affect the liability of an officer of the town for his own negligence, as was urged by the respondent in the principal case. To deny the personal liability of the officer would be to deny any remedy for the wrong suffered by the plaintiff. The general rule is that public officers, though not liable for acts which are judicial in their nature, *Smith* v. *Gould* (1884) 61 Wis. 31; see 14 Columbia Law Rev. 599, are liable for injuries resulting from the negligent performance of purely ministerial duties. Mechem, Public Officers, § 664; *Bennett* v. *Whitney* (1884) 94 N. Y. 302. This liability arises out of the legal duty owed to the public not to discharge the duties of their offices in a negligent manner, and is analogous to the liability of a street contractor to individuals for his negligence, which exists independent of his contract with the town. *McMahon* v. *Second Ave. Ry.* (N. Y. 1877) 11 Hun 347; *Solberg* v. *Schlosser* (1910) 20 N. Dak. 307; but see *Schneider* v. *Cahill* (Ky. 1910) 127 S. W. 143. There would seem to be, therefore, no reason why an exception to the general rule should be made in the case of a town officer because the town employing him is not liable, and this view is sustained by the weight of authority. *Piercy* v. *Averill* (N. Y. 1885) 37 Hun 360; *Robinson* v. *Rohr* (1889) 73 Wis. 436; *Doeg* v. *Cook* (1899) 120 Cal. 213; *contra, Hardwick* v. *Franklin* (1905) 120 Ky. 78. Since the officers in the principal case were engaged in a ministerial duty in repairing the road, see *McCord* v. *High* (1868) 24 Ia. 336; *Tearney* v. *Smith* (1877) 86 Ill. 391, the decision in the principal case seems to be perfectly sound.

OFFICERS—REMOVAL—PROCEDURE.—In proceedings before the City Council leading to the removal of the tax commissioner, the accused was not permitted to be represented by counsel. *Held,* failure to grant this right constituted reversible error. *State ex rel. Arnold* v. *City of Milwaukee* (Wis. 1914) 147 N. W. 50. See Notes, p. 66.

OFFICERS—SALARY—INCREASE DURING TERM.—The State sued to recover an excess in salary, paid to the State Health Officer, due to an increase therein during his term of office. *Held,* since he was employed by and his duties were regulated by the State Board of Health, he was not a state officer within the meaning of § 281 of the Alabama Constitution, which provides that the salary of any officer holding a civil office of profit under the State, county or municipality shall not be increased or diminished during the term for which he shall have been elected or appointed. *State* v. *Sanders* (Ala. 1914) 65 So. 378.

When an office is created by the legislature, and its duties determined by law, the occupant of the office is a public officer, *State* v. *Massillon* (1902) 24 Ohio C. C. 249, to whom has been delegated a part of the sovereignty of the State, *State* v. *Spaulding* (1897) 102 Ia. 639, and he is therefore an agent of the State. See *Clark* v. *Stanley* (1872) 66 N. C. 59; *Henley* v. *Mayor of Lyme* (1828) 5 Bing. 91. But if the duties are determined, not by law, but by contract or by a board, the position of the officer appears to be that of an employee of the board. *State* v. *Massillon, supra,* p. 253. In such a case the delegation of sovereignty is not to the officer but to the board which creates him and whose servant he is, *School Commrs.* v. *Goldsborough* (1899) 90 Md. 193; *Cramer* v. *Water Commrs.* (1895) 57 N. J. L. 478, and the board may remove him at pleasure, which could not be done if he were a public officer. *State* v. *Johnson* (1894) 123 Mo. 43; *State* v. *Massillon, supra.* The state health officer in the principal case is, therefore, not a "state officer" within the meaning of § 281. Another objection to the suit arises from the fact that as the health officer holds at the pleasure of the board he has no term of office, *i. e.,* there is no limit fixed by law, and the increase, therefore, is not during his term. *State* v. *Massillon, supra.* If there is no constitutional limitation, *Givens* v. *Daviess Co.* (1891) 107 Mo. 603, or if the limitation does not apply, there is, of course, no objection to an increase or diminution of salary by the power which created the office. *Loving* v. *Auditor of Public Accounts* (1882) 76 Va. 942.

PLEADING AND PRACTICE—JUDGMENT ON PLEADINGS AFTER DEMURRER—NEW YORK CODE OF CIVIL PROCEDURE.—After demurrer to a complaint, the plaintiff moved for judgment on the pleadings under § 547. The demurrer was shown to be sufficient. *Held,* since the defendant failed to make a similar motion, the court should have confined itself to a simple denial of the plaintiff's motion. *Bacharach* v. *American Union Realty Co.* (N. Y. App. Div., 1st Dept. 1914) 163 App. Div. 940.

Under the Code the sufficiency of a demurrer may now be tested by several methods, including a motion for judgment on the pleadings under § 547. *National Park Bank* v. *Billings* (1911) 203 N. Y. 556; see *Kramer* v. *Barth* (N. Y. 1913) 79 Misc. 80. A successful motion on the pleadings by either party should terminate the action, whether or not the adverse party also moves for judgment. *Cf. National Park Bank* v. *Billings* (N. Y. 1911) 144 App. Div. 536. Even if the defendant fails to make such motion, judgment should be rendered for him upon his demurrer if the plaintiff's motion is denied, since the demurrer admits the facts and the complaint based upon these facts has been declared insufficient. Before the adoption of § 547 in 1908, the only means of testing a demurrer was the formal and cumbersome method of trial provided by §§ 963, 965 and 977. See *Kramer* v. *Barth, supra.* In spite of the evident intention manifested in § 547 to simplify

pleadings, the First Department of the Appellate Division in 1910 decided that a demurrer could be tested only by setting it down for trial. *Ventriniglia* v. *Eichler* (N. Y. 1910) 138 App. Div. 274. Although the Second Department has since qualified this doctrine, *Schwartz* v. *Williams* (N. Y. 1912) 153 App. Div. 302, and although the Court of Appeals has decided that a demurrer may be tested by a motion on the pleadings, *National Park Bank* v. *Billings* (1911) 203 N. Y. 556, the principal case bases its decision on *Ventriniglia* v. *Eichler, supra.* In view of the sympathetic support afforded by the First Department to other recent legislation simplifying pleadings, the principal case seems unfortunately conservative. *Cf. Chapman* v. *Read Co.* (N. Y. 1911) 73 Misc. 401, (1912) 149 App. Div. 52.

PLEADING—SERVICE BY PUBLICATION—SUBJECT OF THE ACTION.—In an action seeking a money judgment against the defendant, the plaintiff sued out an attachment against the defendant's property, and then procured an order for publication under the Code Civ. Proc. § 112, providing for such service when the defendant "is not a resident of the State or has property therein and the court has jurisdiction of the subject of the action". *Held,* since "subject of the action" refers merely to the cause of action of which the court had jurisdiction the service is valid although no property of the defendant had been attached. *South Dakota Commercial Assn.* v. *Ramsey* (S. Dak. 1914) 147 N. W. 75.

While the New York Code of Civil Procedure, § 439, provides merely that a sufficient cause of action be alleged to secure an order by service for publication, the courts have imported into this section the requirements of the old Code of Procedure, § 138, similar to that governing the principal case and now require that the cause of action arise within the State, or that the defendant have property within the State and the court have jurisdiction of the subject of the action. *Bryan* v. *University Pub. Co.* (1889) 112 N. Y. 382; *VanMater* v. *Post* (N. Y. 1911) 147 App. Div. 111. Generally where the action is one to procure a judgment for money only, the judgment is invalid unless the property of the defendant has been attached before judgment is entered, see *Pennoyer* v. *Neff* (1877) 95 U. S. 714, but it seems that the courts as a corollary to the rule stated above have required, even before granting an order for publication, that the property of the defendant has been attached within the State in a case where the cause of action arose without the State, *Rutkosky* v. *Public Service Ry.* (N. Y. 1913) 155 App. Div. 631; see *Bryan* v. *University Pub. Co., supra,* while if, on the other hand, the cause of action arose within the State no property need first be attached. See *Haase* v. *Michigan etc. Co.* (N. Y. 1911) 148 App. Div. 298. The confusion that can but result from this unsound distinction is strengthened by the interpretations put on the requirement that the court have jurisdiction of the "subject of the action". While its meaning should be limited to the sum of all the issues to be determined on the trial, see Pomeroy, Code Remedies (3rd ed.) § 490, some courts have construed it to mean the subject matter or property affected by the action. See *McKinney* v. *Collins* (1882) 88 N. Y. 216; *Bryan* v. *University Pub. Co., supra.* Other jurisdictions, as in the principal case, identify it with the "cause of action", *Hartzell* v. *Vigen* (1896) 6 N. Dak. 117, and therefore hold that if jurisdictional facts exist no property need be attached to secure the order for publication.

QUASI-CONTRACTS—FEES EXACTED UNDER UNCONSTITUTIONAL STATUTE—RECOVERY.—The plaintiff's assignor paid fees for the probate of his testator's will, exacted under an unconstitutional statute. *Held,* the payment was compulsory, and may be recovered, though made without protest. *Diocese of Fargo* v. *Cass County* (N. Dak. 1914) 148 N. W. 541.

Although it is well settled in most jurisdictions that voluntary payments, such as taxes, or fees, made under a mistake of law cannot be recovered, *Sonoma County Tax Case* (C. C. 1882) 13 Fed. 789; *Benson* v. *Monroe* (1851) 61 Mass. 125; *Railroad* v. *Commissioners* (1878) 98 U. S. 541, the rule does not apply to payments made under duress, *e. g.,* to prevent arrest of person, seizure and immediate sale of property, or the loss of some present right. 7 Columbia Law Rev. 601. Where such duress is lacking, because the plaintiff might without present loss, have availed himself of his legal remedy by way of mandamus or otherwise, instead of paying the unlawful assessment, the strict rule denies a recovery under circumstances similar to those of the principal case. *De Graff* v. *County of Ramsey* (1891) 46 Minn. 319. There is, however, some recent authority for holding such a payment involuntary. *Trower* v. *San Francisco* (1907) 152 Cal. 479; see *Lewis* v. *San Francisco* (1905) 2 Cal. App. 112. Since there is every presumption in favor of the constitutionality of the statute, *Salisbury etc. Co.* v. *Commonwealth* (1913) 215 Mass. 371, it seems that in the interests of justice those paying, even without protest, fees required by legislative enactment, should be allowed to recover them on the statute being adjudged unconstitutional, since such payments are practically compulsory when an officer declines to act without them. See *Trower* v. *San Francisco, supra; Lewis* v. *San Francisco, supra.* Public policy is certainly better served by the quiet collection of all payments imposed by the legislature, induced by the knowledge that they can be recovered if unconstitutionally exacted, than by compelling those assessed to test the validity of the statute by mandamus proceedings before paying the levy.

REAL PROPERTY—COVENANTS RUNNING WITH THE LAND AT LAW.—A covenant by the vendee of mining property, his heirs, administrators and assigns, to pay the vendor a certain percentage of the yearly profits was *held* to be personal to the vendor and not to bind purchasers of the land from his assignee in bankruptcy. *Consolidated Arizona Smelting Co.* v. *Hinchman* (C. C. A. 1914) 212 Fed. 813.

The plaintiff's ancestor granted a right of way across his property to a railroad corporation, which covenanted to erect and maintain a flag station thereon. In a suit against the assignee of the covenantor, it was *held* that the defendant company should continue to maintain the flag station if the public interests were not injuriously affected. *Parrott* v. *Atlantic & N. C. R. R.* (N. C. 1914) 81 S. E. 348. See Notes, p. 55.

REAL PROPERTY—LEASES OF AGRICULTURAL LANDS—RENT.—S leased his farm for 25 years to the plaintiff, in consideration of the latter's promise to support and maintain him for life. *Held,* the agreement was not within Art. 1, § 13 of the New York Constitution, which declares that "no lease or grant of agricultural land for a longer period than twelve years, hereafter made, in which shall be reserved any rent or service of any kind, shall be valid." *Parmely* v. *Showdy* (N. Y. 1914) 86 Misc. 634.

At common law the tenant who held his land by rent service was required to render to his lord a definite pecuniary rent, or a certain amount of the products of his land, or, in addition to either of these, such personal services as ploughing. 1 Co. Litt. § 213. This service must always be certain, and periodical, 2 Bl. Comm. *41, 42; *Stephens* v. *Reynolds* (1852) 6 N. Y. 455, and capable of being the subject of distraint by the lord. 1 Co. Litt. *213; 3 Kent. Comm. *460. Being an incident of tenure in common socage, it was not abolished in 1787 by the New York Statute modeled on the Statute of Quia Emptores, (Laws of 1787, *c.* 36) and, where land is not held allodially, still continues to exist, except as limited by the Constitution of 1846. *Cornell* v. *Lamb* (N. Y. 1824) 2 Cow. 652, 659. This was the "service" which was prohibited in leases of agricultural lands by Art. 1, § 13 of the New York Constitution. Clearly the consideration in the principal case was not a reservation within the definition of the constitution, for it was neither certain, nor periodical, nor capable of being the subject of distraint. *Stephens* v. *Reynolds, supra; Parsell* v. *Stryker* (1869) 41 N. Y. 480. Nor is it within the broader definition of rent because it is not "a certain profit," nor does it "issue yearly out of lands and tenements corporeal." 1 Co. Litt. § 213; see *Thorn* v. *De Breteuil* (N. Y. 1903) 86 App. Div. 405, 415. The agreement, therefore, is clearly not within Art. 1, § 13 of the New York Constitution.

STATUTES—FEDERAL EMPLOYERS' LIABILITY ACT—BENEFICIARIES DETERMINABLE UNDER LOCAL LAW.—An action for wrongful death under the Federal Employers' Liability Act, was brought by the administrator of a bastard child. A North Carolina Statute provided that illegitimate children should be considered legitimate for purposes of descent and distribution. *Held,* the local statute rendered his legitimate brothers and sister "next of kin" within the meaning of the Employers' Liability Act. *Kenney* v. *Seaboard Air Line Ry.* (N. C. 1914) 82 S. E. 968.

At common law an illegitimate child was *filius nullius,* and was considered as having no kindred. Legitimacy for purposes of inheritance, however, is often conferred by statute, and the tendency has been to construe such statutes liberally, so as to allow recovery under wrongful death statutes. See 6 Columbia Law Rev. 63. It would seem, however, that the Employers' Liability Act should not be extended by resorting to these State statutes, *cf. Michigan Cent. R. R.* v. *Vreeland* (1913) 227 U. S. 59, for the common law is the true guide in construing the laws of Congress. See *Rice* v. *Railroad* (1861) 66 U. S. 358, 374. Moreover since corporations engaged in interstate commerce are held to their common law obligations, *W. U. Tel. Co.* v. *Call Pub. Co.* (1901) 181 U. S. 92; *Pennsylvania R. R.* v. *Hummel* (C. C. A. 1909) 167 Fed. 89, they should not be denied the benefits of the common law in an action dependent upon an act of Congress, unless such benefits are expressly abrogated by Congress. *Gamble-Robinson etc. Co.* v. *Chicago etc. Ry.* (C. C. A. 1909) 168 Fed. 161. Moreover, a federal statute should not be confused by reading into it local law. See *Reynold* v. *New York Trust Co.* (C. C. A. 1911) 188 Fed. 611, 616. It should be observed that if the phrase "next of kin" is to be defined in the light of local law, the carrier's liability under the act may be limited or extended according to the will of the local legislature, and it is therefore more reasonable to suppose, since there is no express language to the contrary, and since recovery under the

Act is limited to those specifically named therein, and is not for the benefit of the estate, that the intention of Congress was that "next of kin" be understood in its usual and common law significance, so fixing beyond question the extent of the liability imposed. *Cf. Gamble-Robinson etc. Co.* v. *Chicago etc. Ry., supra; Gulf etc. Ry.* v. *McGinnis* (1913) 228 U. S. 173; *Thomas* v. *Chicago etc. Ry.* (D. C. 1913) 202 Fed. 766.

TAXATION—EXEMPTION—PUBLIC PROPERTY.—Land in Louisiana was devised to the city of Baltimore in fee, the income to be applied for the purpose of educating the poor in that city. *Semble,* such property is not taxable in Louisiana. *City of New Orleans* v. *Salmen Brick & Lumber Co.* (La. 1914) 66 So. 237.

Property belonging to the State or to one of its municipalities, and used in the exercise of a governmental function, is ordinarily exempt from taxation, either expressly, by constitution or statute, or by necessary implication. 1 Cooley, Taxation (3rd ed.) 263 *et seq.;* 4 Dillon, Municipal Corporations (5th ed.) § 1396. When this is the rule of the jurisdiction, it is applied, almost without exception, to the public property of one municipality located within another municipality of the same State. *People* v. *Board of Assessors* (1888) 111 N. Y. 505; *West Hartford* v. *Commissioners* (1877) 44 Conn. 360; *cf. Milford Water Co.* v. *Hopkinton* (1906) 192 Mass. 491; but see *Newport* v. *Unity* (1896) 68 N. H. 587. Whether, in the absence of statute, this rule should also be applied to the public property of one State or of a municipality of a State, when located within another State, is open to question. There seems to be a tendency to deny the right to such exemption. See *State* v. *Holcomb* (1911) 85 Kan. 178; *Susquehanna Canal Co.* v. *Commonwealth* (1872) 72 Pa. 72; but see *Stoutz* v. *Brown* (1879) 5 Dill. 445. Certainly, the reason that taxation of such property would defeat its own ends, upon which the implication of exemption is usually based, 1 Cooley, Taxation (3rd ed.) 263, does not apply in this case. Such exemption, however, might well be justified on principles of comity between the States, and by analogy to the application of the general rule to municipalities of the same State, since a different political subdivision would there receive the benefit of the taxation. It would seem that the land in the principal case was public property, for although it was not actually occupied for public school purposes, the income was to be devoted to a specific public purpose. *Cf. Burr* v. *Boston* (1911) 208 Mass. 537; see *Trustees* v. *City Council* (1892) 90 Ga. 634.

TORTS—FALSE IMPRISONMENT—DETENTION OF DELINQUENT CHILD.—The defendant police officers took the plaintiff to the juvenile detention rooms, where she was held as a juvenile delinquent for 48 hours, without the issue of any legal process. *Held,* the defendants are liable for false imprisonment. *Weber* v. *Doust* (Wash. 1914) 143 Pac. 148.

The constitutional guaranties of freedom from imprisonment except by due process of law do not prevent the legislature from prescribing a mode of procedure for the commitment of delinquent or neglected children to State Institutions, *County of McLean* v. *Humphreys* (1882) 104 Ill. 378; *Milwaukee Industrial School* v. *Supervisors* (1876) 40 Wis. 328; *Ex parte Crouse* (Pa. 1839) 4 Whart. 9, which are not prisons for the punishment of criminals, but establishments for the protection of the unfortunate. *Petition of Ferrier* (1882) 103 Ill.

367; *Ex parte Crouse, supra; Wisconsin Industrial School* v. *Clark County* (1899) 103 Wis. 651. Prior to such commitment, however, a hearing must be permitted before some competent judge or tribunal. *State* v. *Ray* (1885) 63 N. H. 406; *cf. Allgor* v. *N. J. State Hospital* (1912) 80 N. J. Eq. 386. In the jurisdiction of the principal case a summons must be issued authorizing the arrest of the child pending such a hearing, Rem. & Bal. Code, § 1991, and since this procedure was not followed by the defendants, it seems plain that they are rightly held answerable for false imprisonment, which consists of any unlawful restraint, upon one's liberty, 2 Kent, Comm. *26; 14 Columbia Law Rev. 537; *Gold* v. *Bissell* (N. Y. 1828) 1 Wend. 210; *Goodell* v. *Tower* (1904) 77 Vt. 61, and for which a public officer, and even a judge, is liable if acting without jurisdiction or under process void on its face. *Goodell* v. *Tower, supra; Stephens* v. *Wilson* (1903) 115 Ky. 27. Since malice is not necessary to the tort of false imprisonment, *East* v. *Brooklyn, etc. R. R.* (N. Y. 1906) 115 App. Div. 683; Burdick, Torts (3rd ed.) § 278, and since the legislature did not provide for summary arrest even in cases of exigency, the fact that the officers, without legal process, arrested the defendant for her own benefit was rightly disregarded in the principal case, and the allowance of substantial damages seems correct.

TRANSFER TAX—DEVISE TO BENEVOLENT CORPORATION.—A bequest to a corporation founded for the benefit of the employees of a certain company, though not a gift for charitable purposes, was nevertheless *held* exempt from taxation as a devise to a benevolent corporation. *Matter of Altman* (1914) 149 N. Y. Supp. 601.

An exception to the rule requiring certainty as to the beneficiaries of a trust, is very generally made in favor of charitable trusts. To bring a trust within the exception its purposes must amount to a public charity, in the sense that the class of persons who are to benefit by it must be indefinite. So where a definite body of individuals, ascertained or ascertainable, is designated by the terms of a gift to receive its benefits, it is not a gift to charity. *Old South Society* v. *Crocker* (1875) 119 Mass. 1, 22; see 3 Columbia Law Rev. 269. In the cases dealing with the doctrine of charitable trusts there is a well established distinction between "charity" and "benevolence", and it is held that bequests for solely benevolent purposes do not come within the exception, since "benevolence" is not necessarily limited to "charity" in the legal sense, but might include mere private generosities. *Morice* v. *Bishop of Durham* (1805) 10 Ves. Jr. 521; *James* v. *Allen* (1817) 3 Meriv. 17; *Chamberlain* v. *Stearns* (1873) 111 Mass. 267. In cases where it might seem that the term "benevolence" could have been deemed limited by other words in the bequest pointing to purposes strictly charitable, the courts have refused so to consider it, holding the gift invalid as a charitable trust since it need not necessarily have been applied to charity. *Williams* v. *Kershaw* (1835) 5 L. J. Ch. [N. S.] 84; *Norris* v. *Thomson's Exrs.* (1868) 19 N. J. Eq. 307, affd. 20 N. J. Eq. 489; *contra, Saltonstall* v. *Sanders* (1865) 93 Mass. 446, 465; but see *Matter of Cunningham* (N. Y. 1912) 76 Misc. 120. Although it has been held in New York that as regards the doctrine of charitable trusts the distinction between "benevolence" and "charity" has been abolished by Real Property Law, § 113; see 12 Columbia Law Rev. 356, nevertheless the New York courts recognize the common law distinction, see *Matter of Cunningham, supra,* and the principal case indicates that the terms as used in the Transfer Tax Law are not synonymous.

TRANSFER TAX—GIFTS—INTEREST OF THE SURVIVOR OF A JOINT TENANCY.—A, the owner of certain shares of stock, had the certificate issued to himself and B "and the survivor", reserving the right to annul B's interest therein. By virtue of certain agreements between A and the company, made shortly before and after the transfer of the joint interest to B, A was to receive the entire net income of the company for life. The transfer was made without consideration. On the death of A, his interest accrued to B as survivor. *Held,* the entire property passing to B was taxable. *Matter of Dana* (N. Y. 1914). Not yet reported. 52 N. Y. L. J. 251.

Since the transfer tax statute does not contemplate a transfer of property made for a valuable consideration, the interest accruing to the survivor of a joint tenancy arising out of such a transfer is not subject to the tax. *In re Heiser* (N. Y. 1913) 85 Misc. 271. And since the tax is not imposed upon a transfer by a *bona fide* gift *inter vivos,* not made in contemplation of death, *Matter of Spaulding* (N. Y. 1900) 49 App. Div. 541, affd. 163 N. Y. 606; see *Matter of Hess* (1906) 110 App. Div. 476, it would seem that where a joint tenancy has its inception in such a gift, and the donee's interest is intended to, and does take effect immediately, no tax should be imposed upon the right of survivorship, as this is merely an incident of the legal interest presently enjoyed. *Matter of Stebbins* (N. Y. 1907) 52 Misc. 438; *cf. Kelley* v. *Beers* (1909) 194 N. Y. 49. The courts, however, generally hold the interest passing to the survivor subject to the tax, as a gift intended to take effect at the death of the donor. *In re Bernuth's Estate* (1913) 143 N. Y. Supp. 672; *Matter of Durfee* (N. Y. 1913) 79 Misc. 655; *contra, Matter of Stebbins, supra.* There is, however, a well established qualification of the rule as to gifts *inter vivos,* deemed necessary to prevent an evasion of the law, that although there be a transfer complete on its face, if the donor, either directly or by collateral agreement, reserves rights inconsistent with the complete ownership and enjoyment of the gift by the donee, it is within the statute. *Matter of Brandreth* (1902) 169 N. Y. 437; *Matter of Cornell* (1902) 170 N. Y. 423; McElroy, Transfer Tax Law (2nd ed.) § 172. The circumstances of the principal case bring it within this qualification, and the holding is therefore justifiable, whether or not in all cases of gifts of joint interests in property, the right of survivorship should be taxable.

WATERS AND WATERCOURSES—CONTROL OF NAVIGABLE STREAM.—The State granted to the plaintiff the soil under the St. Lawrence River for the purpose of using the water to develop electrical energy, with the right to erect locks, dams, and bridges, on condition that "navigation shall be preserved in as good condition as, if not better than" at the time of the grant, and on the further condition that Congress authorize the undertaking. The plaintiff sues to compel the State Treasurer to accept $25,000, as a payment due under the law incorporating the plaintiff. Before appeal the incorporating statute was repealed. *Held,* one judge dissenting, that the act incorporating the plaintiff was unconstitutional, vesting no power in it to enforce any act thereunder. *Long Sault Development Co.* v. *Kennedy* (N. Y. 1914) 105 N. E. 849. See Notes, p. 68.

WATERS AND WATER COURSES—DRAINAGE OF SURFACE WATERS—INCREASE AND ACCELERATION.—The defendant by means of tiles increased and

accelerated the natural flow of surface water from his land through a depression crossing the land of the plaintiff. *Held,* since it did not appear that the plaintiff had suffered any substantial damage, an injunction would not issue. *Miller* v. *Hester* (Ia. 1914) 149 N. W. 93.

At common law the upper tenant may, in the course of building or grading, cast surface water on the lower tenant's land, and any damage resulting is *damnum absque injuria, Gannon* v. *Hargadon* (1865) 92 Mass. 106, and the lower tenant may protect himself by dams and dikes. See *Sullivan* v. *Browning* (1904) 67 N. J. Eq. 391. The upper tenant, however, may not collect surface water and empty it in volume on the lower tenant's land, *Brandenberg* v. *Ziegler* (1901) 62 S. C. 18, and since such a use is adverse the upper tenant may thereby acquire an easement after the statutory period. *White* v. *Chapin* (1866) 94 Mass. 516. Ordinarily, in the absence of some adverse use, the common law recognizes no easement or servitude upon the servient estate. *Rathke* v. *Gardner* (1883) 134 Mass. 14. On the other hand, since the civil law recognizes the right of the upper tenant to have the normal drainage conditions continued and the duty of the lower tenant to receive the normal flow in the normal manner, see *Matteson* v. *Tucker* (1906) 130 Ia. 511, the civil law seems to be better suited to the needs of agricultural communities, and it has, therefore, been generally adopted. *Obe* v. *Pattat* (1911) 151 Ia. 723; see *Ready* v. *Missouri Pac. Ry.* (1902) 98 Mo. App. 467; *Wood* v. *Moulton* (1905) 146 Cal. 317. Under this rule, however, it is generally held that the upper tenant may accelerate and increase the flow in any depression through which water naturally drains, *Fenton etc. R. R.* v. *Adams* (1906) 221 Ill. 201, unless the change is so great as to cause substantial damage to the servient estate. *Hull* v. *Harker* (1906) 130 Ia. 190; *Vrossville* v. *Stewart* (1898) 77 Ill. App. 513. This view has been substantially embodied in the statutes of some states. *Jontz* v. *Northup* (Ia. 1912) 137 N. W. 1056; *cf. Aldritt* v. *Fleizchauer* (1905) 74 Neb. 661, 671.